SUBJECT INDEX

	Page
Supplemental Statement of Facts	1
Summary of Argument	5
Argument	10
Conclusion	17

TABLE OF CASES

Page

Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 234 5

Connecticut, etc., Co. v. Lathrop, 111
U. S. 612, 615 .....7, 9, 14, 16

Eastern State Lumber Assn. v. U. S., 234
U. S. 600, 612 .....5, 10, 13

Eastman Kodak Co. v. Southern Photo Co.,
273 U. S. 359, 378 .....8, 15

Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 440 ....5, 13

Paramount Famous Lasky Corp. v. U. S., 282
U. S. 30, 42-44 .....5, 6, 10

Pence v. Langdon, 99 U. S. 578, 580 .....7, 8, 14, 16

Pierce v. Tenn. Co., 173 U. S. 1 .....8, 15

Pocahontas Coke Co. v. Powhatan Coal & Coke Co.,
60 W. Va. 508, 525 .....6, 14

Rankin v. Bill Posters Assn., 42 Fed. (2d) 152, 155-156....8, 15

U. S. v. American Oil Co., 262 U. S. 371, 388 6

U. S. v. E. C. Knight & Co., 156 U. S. 1, 17 .....6, 14

TEXTBOOKS CITED

Thornton, "A Treatise on the Sherman
Anti-Trust Act," p. 105 .....6, 14

Supplemental Statement of Facts

The opinion of this Court accurately characterizes and identifies the journals that are parties to this proceeding—state or sectional farm papers, which circulate largely in the State where printed. Likewise, this type papers is distinguished from the vocational group, and from the nationals which have a nation-wide circulation. A general farm paper may include either state, national or local farm magazines, but not the vocational journals.

Respondents' witness Gregory testified on cross-examination, to quote only a part, as follows (R. 137):

> We have rather well marked agricultural sections in which certain classes of advertising is peculiarly in demand. For instance, we have a section they call the corn belt section. The advertising that would be peculiarly adapted to what we refer to as the corn belt would not be desirable advertising for all of the national papers. There are two of those so-called nationals which have the bulk of their circulation in the corn belt, and they do compete pretty strongly for the kind of advertisement we are speaking of . . .

Respondents' witness Gill testified in part as follows (R. 127-128):

> Farm papers are classified as national farm papers, which is a paper that circulates over the Union in substantially all of the states; and technical and vocational, as they are generally known. A technical publication is a paper that appeals to dairy farmers or any particular class of farming. The vocational paper is the same as a technical paper. And then the other is the state and local farm paper—sometimes called

sectional. Some people call state farm papers sectional farm papers and some of them call them state papers and some call them local papers. * * * Assuming that state and national (sectional) papers are the same thing, there now is published in Illinois one—the Prairie Farmer; one in Nebraska—The Nebraska Farmer. In 1928 there were published in Illinois the Prairie Farmer and the Illinois Farmer. The Illinois Farmer was taken over by the Prairie Farmer.

The Court: How many are there in Indiana?

The Witness: There is two, what we call two Indiana farm papers: the Prairie Farmer, Indiana Edition, and the Indiana Farmer's Guide.

The Farm Life that was published at Spencer, Indiana, a while, was more or less national. It isn't published now. * * * Just one state paper published in Iowa—Wallace's Farmer and Iowa Homestead; just one in Nebraska—The Nebraska Farmer; one in Minnesota—The Farmer and Farm, Stock & Home; one in Wisconsin —Wisconsin Agriculturist & Farmer. The Farmer & Farm, Stock & Home, that is a Minnesota paper published at St. Paul. The two editions are the Minnesota Edition and the Dakota Edition. * * *

Depending upon the supporting data given in Exhibits 29-40 (R. 83-117), Exhibit 41 (R. 123, 124) reveals that the following general farm papers, all of which were published in one of the eight states comprising the Midwest Unit, went out of business from 1928 to 1932: "Illinois Farmer" (Illinois); "Iowa Farmer and Corn Belt Farmer" (Iowa); "Iowa Homestead" (Iowa); "South Dakota Farmer and Breeder" (South Dakota); "Wisconsin Farmer" (Wisconsin), and "Farm Life" (Indiana). In addition, by the time of trial one other journal in the territory had ceased publication (R. 128): "The Da-

kota Farmer" (So. Dakota). All of the above papers were state farm papers, with the exception of "Farm Life," which respondents' witness Gregory characterized as "more or less national" (R. 128).

Thus, now, the respondents have but one competing state farm paper in the entire Midwest Unit territory—petitioner's paper, "The Indiana Farmer's Guide" (R. 128); all other state or sectional farm papers have vanished. Why these other papers have gone out of business the Record does not directly show; the answer must rest upon inferences.

Directing attention to certain savings therein computed, the respondent Prairie Farmer disseminated to advertisers a circular including the following, which is a part of Exhibit 13 (R. 55):

> Cost of Covering Indiana With Prairie Farmer (Ind. Ed.) Instead of Farmers Guide, When the Midwest Unit is Used to Cover the Eight States of Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Nebraska and Iowa:

	Line Rate	One Column	Two Columns	Full Page
The Farmer (2 Editions) ...	$1.60	$312.50	$625.00	$1,250.00
Nebraska Farmer	.85	154.70	309.40	618.80
Wallace's Farmer	1.75	343.00	686.00	1,372.00
Wisconsin Agriculturist	1.25	245.00	490.00	980.00
Prairie Farmer (Ill. Ed.) ...	1.30	236.60	473.20	946.40
Indiana Farmers Guide	1.00	196.00	392.00	784.00
Total for eight states	$7.75	$1,487.80	$2,975.60	$5,951.20
Unit Rate for 8 states	$7.00	$1,274.00	$2,548.00	$4,870.00
Substitute Prairie Farmer for Indiana and Save ..	$ .75	$ 213.80	$ 427.60	$1,081.20

Respondents, at page 10 of their petition, have a table showing the circulation of the six national papers in the eight Midwest Unit states. The figure given is 3,441.941. The same source of information, however, (R. 85, 87) shows that the total circulation of these same journals is 8,016,162; or, in other words, 4,574,221 copies of these national papers circulate to other parts of the country.

As to the theory and proof of damages:

(1) The primary cause of petitioner's injury is the combination rate which was effected by the respondents.

(2) Because of this rate, petitioner claims that it has lost advertising lineage which otherwise it would have carried.

(3) In proving its damages, petitioner has confined itself to advertising lineage which actually has been run in all of respondent publications, as a unit (Exhibits 7-11, R. 26-50; Exhibits 14-19, R. 60-74; R. 80).

(4) Petitioner, in turn, has classified this lineage into two groups: (a) old accounts, that is, accounts which had been run in petitioner's paper some time during the years 1928-1932, but which subsequently were dropped from the paper (Exhibits 14-15, R. 60-61); and (b) those accounts which were not carried by petitioner during the years 1928-1932—but which were run by all of the Midwest Unit papers (Exhibits 16-17, R. 63-64).

(5) The loss of lineage under (a), above, is shown to be in excess of 64,000 lines (Exhibit 14, R. 60); the loss under (b) is, in round numbers, 131,000 lines (Exhibits 16-17, R. 63-64). Thus, the total loss claimed is shown to be in excess of 195,000 lines.

(6) Petitioner's display advertising rate is $1.00 per line (R. 75).

(7) Petitioner's treasurer, Frank Martin, a certified public accountant (R. 75), testified in detail, for each year involved in the complaint, as to petitioner's display advertising revenue and estimated what it would have been, in the absence of the combination rate (R. 78-80). A computation made from these estimates for the five-year period shows a total loss of over $145,000.

The witness was not cross-examined by counsel (R. 80).

Summary of Argument

The Jury Would Have Been Warranted in Finding That Respondents' Activities Violated Either Sections 1 or 2, or Both, of the Sherman Act.

(1) Petitioner was not required to prove a conspiracy by direct evidence; a conspiracy may be inferred from the things actually done.

Eastern States Lumber Assn. v. U. S., 234 U. S. 600, 612.

(2) While respondents, if they were acting severally and not in concert, might not offend the prohibitions of the Act, yet the activities such as complained of here, being done by many acting in concert, take on the form of a conspiracy, with an accompanying liability to any against whom the concerted action is directed, if they suffer thereby.

Eastern States Lumber Assn. v. U. S., 234 U. S. 600, 614.

Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 440.

(3) Conceding, for the sake of argument only, that respondents effectuated the Midwest Unit combination in order better to meet the competition afforded by the national papers, that fact could not relieve respondents from liability to petitioner, when the necessary effect of their concerted activities was to and in fact did stifle and directly and substantially restrict the free competition afforded by petitioner's paper.

Paramount Famous Lasky Corp. v. U. S., 282 U. S. 30, 42-44.

Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 234.

(4) Should, for example, an advertiser desire Indi-

ana coverage in petitioner's paper instead of "Prairie Farmer" but at the same time wish to use the balance of respondents' state farm papers to cover the other seven middle Western States, respondents' scheme of selling a full page in all seven of their editions for almost $300 less than they sell like space in six, can not be disguised as a normal or fair competitive plan of business.

(5) The purpose of the Sherman Act is to secure equality of opportunity and to prohibit abnormal contracts and combinations, such as found here, which tend directly to suppress the conflict for advantage called competition.

U. S. v. American Oil Co., 262 U. S. 371, 388.
Paramount Famous Lasky Corp. v. U. S., 282 U. S. 30, 43.

(6) The evidence offers no dispute as to the fact that all of the litigating papers in this proceeding are state farm papers and that the petitioner's publication is the only surviving competitior in the territory involved in the complaint.

(7) The evidence strongly supports the ultimate fact that respondents have endeavored to put the petitioner out of business.

(8) There is no dispute as to the fact that respondents have succeeded in increasing their percentage of advertising carried in all the general farm papers, excepting the nationals, published in the eight Midwest Unit States, from 56 per cent, in 1928, to 82.9 per cent, in 1932.

(9) It is a well recognized rule that a combination need not be a complete monopoly before it is subject to attack; it is sufficient if it really tends to that end.

U. S. v. E. C. Knight & Co., 156 U. S. 1, 17.
Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 525.
Thornton, "A Treatise on the Sherman Anti-Trust Act," p. 105.

(10) A directed verdict is proper only when the

state of the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly.

Pence v. Langdon, 99 U. S. 578, 580.

(11) A case should not be withdrawn from the jury unless the evidence be of such a character as to compel the court, in the exercise of a sound legal discretion, to set aside a verdict in opposition to it.

Connecticut, etc., Co. v. Lathrop, 111 U. S. 612,615.

The Jury Would Have Been Warranted in Returning a Verdict Awarding Petitioner Substantial Damages.

(1) The advertising lineage petitioner claims to have lost (more than 195,000 lines) because of respondents' combination rate included only the precise advertisements which were actually run in all seven of respondents' papers, but did not appear in petitioner's paper.

(2) Approximately 64,000 lines (petitioner's rate is $1.00 per line) of this amount were placed by advertisers who during this period had previously been using petitioner's paper, but who subsequently discontinued it; 131,000 lines were contracted for by advertisers who, from 1928-1932, had not used petitioner's paper.

(3) It properly might have been inferred by the jury that the advertisers who had been using petitioner's paper would have continued so to do, in the absence of the Midwest Unit rate; likewise, it would have been a proper inference that petitioner's paper would have received contracts from advertisers who

did not use its paper at all, during the period in controversy.

Eastman Kodak Co. v. Southern Photo Co., 273 U. S. 359, 378.

(4) Petitioner's treasurer, after qualifying himself as an expert accountant and showing himself as being familiar with the data shown by the various exhibits introduced in evidence, stated in detail petitioner's revenue for each of the years involved, and for a like period estimated what, in his opinion, the revenue would have been, in the absence of the combination rate. The total difference amounts to $146,131.25.

(5) When, because of their unlawful conduct, respondents have injured the petitioner and have made difficult the ascertainment of the precise damages suffered by the petitioner, respondents may not be heard to complain that the damages can not be measured with exactness.

Eastman Kodak Co. v. Southern Photo Co., 273 U. S. 359, 378.

Pierce v. Tenn. Co., 173 U. S. 1.

Rankin v. Bill Poster Assn., 42 Fed. (2d) 152, 155-156.

(6) If respondents had reason to believe that the estimate of the witness Martin was unfair, they had ample opportunity by cross-examining him to discredit his testimony or to show any fallacy in his reasoning. The witness, however, was not cross-examined.

(7) A directed verdict is proper only when the state of the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly.

Pence v. Langdon, 99 U. S. 578, 580.

(8) A case should not be withdrawn from the jury unless the evidence be of such a character as to compel the court, in the exercise of a sound legal discretion, to set aside a verdict in opposition to it.

Connecticut, etc. Co. v. Lathrop, 111 U. S. 612, 615.

Argument

The burden of respondents' arguments for a rehearing seems to be that their combination activities were entered into for the purpose of meeting the competition afforded by the national farm papers. It is not contended—nor could it be contended from any record showings—that these national publications themselves have joined in any combination to give them an unnatural or unfair advantage in conducting their respective business operations; and it appears not clear upon what theory the respondents hope to gain immunity from the effects of their admitted combination, in their efforts to convince the Court that it was not the state papers, but the national farm organs, whose legitimate business activities they sought to invade by their abnormal and unlawful combination.

As we read the Sherman Act and interpret the decisions of this Court in construction thereof (***Eastern States Retail Lumber Dealers Association*** v. ***U. S.***, 234 U. S. 600; ***Paramount Famous Lasky Corp.*** v. ***U. S.***, 282 U. S. 30) the Act is no respecter of persons, the larger, as well as the smaller, being equally entitled to protection from individuals or corporations, separately engaged in competitive business enterprises, who enter into "abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition." This Court said, to quote from the opinion first above referred to (p. 613):

> "The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with a right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain

competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to national authority thus exerted."

And as stated in the latter opinion (pp. 42-43):

"* * * The Sherman Act was intended to secure equality of opportunity, and to protect the public against evils commonly incident to monopoly, and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain. * * *'

"* * * The prohibition of the statute cannot 'be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with good intentions of parties, and, it may be, of some good results.' "

If the respondents desired more effectively to compete with the national publications, it was within their rights severally to expand their plants, to widen the scope of their circulations and to broaden the objects of news appeal, and thus compete upon the same basis. But for them to unit their investments and resources throught an abnormal agreement and rate set-up which they claim affords them an advantage in competing for the larger business without sacrificing the facilities for the smaller field, is a type of unfair competition denounced by the Act.

But this effort to divert the direct issue, like most alibis, is seemingly intended only for the exigencies of this case. Had the national papers been the real targets of respondents' combination advertising schedules, it seems probable that respondents would have brought before the Court the rate schedule of the national publications, so as to afford it the data for making comparisons. The record nowhere dis-

closes the advertising rates of the national farm papers.

In their petition for rehearing (p. 14), respondents say that "the evidence in this record shows that the circulation of the six great national farm papers in the eight states in which respondents' papers principally circulate is more than six times respondents' combined circulation in such states." This evidently is an inadvertence, for the combined circulation of the respondents' publications, as stated in the petition, was 1,084,336, while the circulation of the national papers in those states was 3,441,941 (petition for rehearing, p. 10). With a total national circulation of 8,016,162 (R. 85, 87), 4,574,221 copies of these national papers go to other parts of the country. Would a prudent advertiser, desiring to call attention to his product only in the middle western states, use a national paper circulating throughout the entire country, when to do so he would have to pay at a rate commensurate with that vast circulation—would have to pay for the surplus circulation to parts where he would not contemplate or desire sales?

On account of the inherent differences in the scope of territory covered, the diversity of industry, and appeal to reader interest, any competition between the two classes—the national farm journals and the state farm papers—necessarily is of an indirect and inconsequential character.

Notice of that portion of Exhibit 13 (R. 55) carried in the "Supplemental Statement of Facts," utterly dispels respondents' pretensions that it was the national and not the state papers at which the Midwest Unit combination was aimed. Furthermore, the record shows (R. 128) that petitioner's paper is the only surviving state farm paper competitor of respondents in this territory; the balance have disappeared since 1928 (Exhibits 29-40, R. 83-117; Exhibit 41, R. 123-124). The evidence of the witness Gregory,

president of the Midwest Unit organization, and vice president of the Prairie Farmer Company (R. 137), quoted previously herein, assists us considerably in marking the distinctions between state and national farm papers, so far as normal competition between them is concerned.

As bearing upon the question of the type of proof required in showing a conspiracy on the part of the respondents, we quote the following language from the opinion of this Court in the case of ***Eastern States Lumber Association*** v. ***U. S.,*** 234 U. S. 600 (612):

> "* * * It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done. . ."

At page 614, the Court quotes with approval from ***Grenada Lumber Company*** v. ***Mississippi,*** 217 U. S. 433, 440:

> "'* * * An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.'"

Thus, what any one of the respondents may or might do, when acting separately, is one thing, and what they have done in acting in concert is another.

Exhibit 13 (R. 55), coupled with the results proven on the trial, strongly supports the ultimate fact that respondents have endeavored to put petitioner out of business. Likewise, it properly may be inferred that the several state farm papers which suspended business in this territory since 1928 were forced to do so because of the same activities of the respondents which are sapping the life blood of petitioner's paper.

At page 6 of petitioner's reply brief, filed prior to the hearing of the cause, a table is set forth (but not

repeated here) showing that respondents have succeeded in increasing their percentage of advertising carried in all of the general farm papers, excepting the nationals, published in the eight Midwest Unit states, from 56 per cent in 1928 to 82.9 per cent in 1932. This graphically shows the success of respondents' scheme.

A combination need not be a complete monopoly before it is subject to attack; it is sufficient if it really tends to that end.

> "Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."
>
> U. S. v. E. C. Knight & Co., 156 U. S. 1, 17.
>
> See also: Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 525.
>
> Thornton, "A Treatise on the Sherman Anti-Trust Act," p. 105.

A directed verdict is proper only when the state of the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly.

> Pence v. Langdon, 99 U. S. 578, 580.

A case should not be withdrawn from the jury unless the evidence be of such a character as to compel the court, in the exercise of a sound legal discretion, to set aside a verdict in opposition to it.

> Connecticut etc. Co. v. Lathrop, 111 U. S. 612, 615.

In the light of the record disclosures and the principles and authorities hereinabove set out, we believe there can be no room for doubt that the jury would have been warranted in finding that respondents violated both sections 1 and 2 of the Act.

PETITIONER'S DAMAGES

The proof shows (Exhibits 32-40, R. 93-119) that petitioner's paper had a substantially larger circulation in Indiana than the Indiana Edition of the "Prairie Farmer." For Indiana coverage, therefore, petitioner's paper naturally offered the better medium in this State.

We have cited the decisions of this and other courts affirming the doctrine that those who commit wrongs such as those found here are in no position to be overexacting as to the character of proof of damages, and that it is competent to obtain estimates from those familiar with the history of the business.

> Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 378.
>
> Pierce v. Tenn. Co., 173 U. S. 1.
>
> Rankin v. Bill Posters Assn., 42 Fed. (2d) 152, 155-156.

In this case, in view of the prevailing national depression, petitioner was unwilling to submit the case upon mere estimates based upon the operating revenues before and after the unlawful enterprise was entered upon. Such testimony would have been open to honest question as to how far the losses may have been caused by the depression. To meet this situation, petitioner went further and carried the investigation to the specific accounts which were run in the Unit group during the period, but which petitioner did not receive for Indiana coverage. As illustrative of these accounts, we make reference to the first fourteen of them appearing in Exhibit 19 (R. 74), all of which appeared in the Unit group, including the "Prairie Farmer" (Ind. Ed.), in the year 1931, but none of which appeared in the petitioner's publication. The names of the advertisers, in the main, indicate the character of the things advertised to be that which is peculiarly adapted to the corn belt, and it would be a fair inference for the jury to

draw the conclusion that the loss to petitioner was occasioned by the Unit activities and schedule. For the full five-year period in question, 117 such accounts were carried in the Unit group but lost by the petitioner for Indiana coverage (Exhibit 19, R. 70-74).

The claim that some of these accounts may have been obtained by the Unit through the exclusive right to use the so-called Ralston Colored Inserts is but another way of confessing pernicious activities. There is nothing to justify any claim that the petitioner could not have contracted with Ralston for these colored inserts, except for the Unit's doings.

The respondents had an opportunity to cross-examine the witness Martin as to the basis of his estimate of damages, and as to whether he had sources of information other than the fact of the lost accounts. But respondents did not cross-examine the witness (R. 80). At most, the extent of damages was a question of fact for the determination of the jury. There was competent evidence to warrant the inference that the petitioner sustained damages in the amount tacitly recognized in the opinion of the Court of Appeals.

Pence v. Langdon, 99 U. S. 578, 580.
Connecticut etc. Co. v. Lathrop, 111 U. S. 612, 615.

CONCLUSION

We believe the following conclusions fairly may be drawn from the record facts and the authorities applicable thereto:

(a) Respondents did not enter into the Unit combination for the purpose of meeting the competition of national farm papers.

(b) Even if otherwise, respondents had no legal right to combine their separate investments, resources and activities for the purpose of meeting the competition of the national publications, acting separately.

(c) Respondents entered upon their combination program for the purpose of obtaining an unfair advantage over the other state papers published and circulated within the eight states substantially comprising the grain and stock belt section of the country.

(d) The proof that in their articles (Midwest Farm Paper Unit, Inc.), respondents agreed to co-operate with each other; that they each had equal representation on this corporate board, with no invitation or opening to other state farm papers within the territory to join in their Unit program and rates; their affirmative propaganda against advertising in other state farm papers published within the territory, specifically naming petitioner's publication; the failure of the several other state farm papers during the Unit activities; the substantial loss in advertising accounts sustained by the petitioner during said period, and other facts and circumstances disclosed by the record made it a case for the jury. And it would have been error for the District Court to have taken the case from the jury on the ground of insufficiency of evidence.

Believing that all questions were fully considered and rightly decided by this Court on the former hearing, we earnestly pray that the petition for rehearing be denied.

Respectfully submitted,

U. S. LESH,
JAMES E. LESH,
Indianapolis, Ind.
EBEN LESH,
JOSEPH H. LESH,
Huntington, Ind.

Counsel for Indiana Farmers Guide Publishing Co.